

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

APRIL TERM, 1931

No. 5468

46

LLOYD R. TURNER, APPELLANT,

vs.

**AMERICAN SECURITY AND TRUST COMPANY, A
CORPORATION, EXECUTOR UNDER THE WILL
OF PETER G. SAUER, DECEASED.**

**APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.**

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Court of Appeals of the District of Columbia

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vs.

AMERICAN SECURITY AND TRUST COMPANY, A
CORPORATION, EXECUTOR UNDER THE WILL
OF PETER G. SAUER, DECEASED, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia

No. 5468.

LLOYD R. TURNER, Appellant,

vs.

AMERICAN SECURITY AND TRUST COMPANY, a Corporation,
Executor under the Will of Peter G. Sauer, Deceased.

a Supreme Court of the District of Columbia.

At Law.

78832.

AMERICAN SECURITY AND TRUST COMPANY, a Corporation,
Executor under the Will of Peter G. Sauer, Deceased,
Plaintiff,

vs.

LLOYD R. TURNER, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed November 13, 1930.

In the Supreme Court of the District of Columbia.

At Law.

No. 78832.

AMERICAN SECURITY AND TRUST COMPANY, a Corporation,
Executor under the Will of Peter G. Sauer, Deceased,
Plaintiff,

vs.

LLOYD R. TURNER, Defendant.

Plaintiff, American Security and Trust Company, a corporation, Executor under the will of Peter G. Sauer, deceased, sues the defendant, Lloyd R. Turner, for that on or about February 4, 1928, by his promissory note, for a good and valuable consideration, promised to pay Peter G. Sauer the sum of Twenty thousand seven hundred ninety-six dollars and seventy-seven cents (\$20,796.77) with interest thereon at the rate of seven per centum (7%) per annum, said principal and interest payable in monthly instalments of One thousand dollars (\$1,000), (with the privilege of making larger payments in any amount), on the 4th day of each and every month after date, until paid, each instalment when so paid to be applied, first, to the payment of interest on account of principal remaining unpaid, and balance thereof credited to the principal; that Peter G. Sauer died on or about June 15, 1929, and plaintiff was duly appointed by the Supreme Court of the District of Columbia and qualified on or about October 1, 1929, as Executor under the will of said Peter G. Sauer, deceased, and as such Executor, now holds such note; that said note is now overdue and defendant has paid on account thereof only the sum of Fifteen thousand nine hundred nineteen dollars and ninety-three cents (\$15,919.93), of which Two thousand two hundred forty-eight dollars and eighty-eight cents (\$2,248.88) has been credited to interest and Thirteen thousand six hundred seventy-one dollars and five cents

(\$13,671.05) credited to principal, leaving a balance due of Seven thousand one hundred twenty-five dollars and seventy-two cents (\$7,125.72), with interest thereon at seven per centum (7%) per annum, from September 5, 1930, which defendant has failed and refused to pay, and there is now justly due from the defendant to the plaintiff on account thereof the sum of Seven thousand one hundred twenty-five dollars and seventy-two cents (\$7,125.72), with interest thereon at seven per centum (7%) per annum, from September 5, 1930, as more fully set forth in the bill of particulars hereto attached and made a part hereof.

Wherefore plaintiff claims of the defendant said sum of Seven thousand one hundred twenty-five dollars and seventy-two cents (\$7,125.72), with interest thereon at seven per centum (7%) per annum from September 5, 1930, besides costs.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Plaintiff.

3 *Bill of Particulars*

Given as deferred purchase-money for and secured by second deed of trust on lot —, Square —.

— and —, Trustees.

Subject to a first trust for \$—, Dated — —, 192—, at —%. Placed by — —.

\$20,796.77.

Washington, D. C., Feb. 4th, 1928.

For value received I promise to pay to the order of Peter G. Sauer the sum of twenty thousand seven hundred ninety-six and 77/100 dollars, with interest until paid at the rate of Seven per centum per annum.

Said principal and interest payable in monthly installments of one thousand dollars (with the privilege of making larger payments in any amount), on the 4th day of each and every month after date, until paid; each installment when so paid to be applied, first, to the payment of the interest on the amount of principal remaining unpaid, and the balance thereof credited to the principal.

Interest to be paid at each payment.

LLOYD R. TURNER,
Address: 600 7 St. S. W.

This is to certify that this is the note described in a Deed of trust to the Trustees named hereon, and bearing even date herewith. Said Deed of Trust and note having been executed in my presence.

_____,
Notary Public.

Retain this note after payment that the Trustees may be satisfied as to its cancellation when a release is desired.

Payments on account of above note and interest are acknowledged as follows:

Date of payment.	Interest due (paid).	To principal.	Balance due principal.
1928			
May 5	\$ 52.50	\$3,000.00	\$17,796.77
June 12	23.33	1,000.00	16,796.77
Oct. 15	186.67	413.33	16,383.44
Nov. 20 to Oct. 4	233.35	866.65	15,516.79
Dec. 4	52.50	1,000.00	14,516.79
Jan. 15, 1929	59.11	1,000.00	13,516.79
Feb. 11	71.36	1,000.00	12,516.79
Mar. 15	75.83	1,700.00	10,816.79
Apr. 19	90.42	1,000.00	9,816.79
May 14	94.88	1,000.00	8,816.79
Sept. 5, 1930	1,308.93	1,691.07	7,125.72

4 *Affidavit of Merit.*

DISTRICT OF COLUMBIA, ss:

I, Albert H. Shillington, being first duly sworn on oath depose and say that I am Assistant Secretary of the American Security and Trust Company, a corporation, Executor under the will of Peter G. Sauer, deceased, and in that capacity I have control of and am familiar with the notes, evidences of indebtedness and records held by said Company, as such Executor; that I have read the declaration and bill of particulars, which are hereto attached and made a part hereof, and the facts therein stated are true to the best of my knowledge, information and belief, and the defendant, Lloyd R. Turner, is justly indebted to the plaintiff, American Security and Trust Company, as such Executor, on account of the note described in said declaration and

bill of particulars in the sum of Seven thousand one hundred twenty-five dollars and seventy-two cents (\$7,125.72), with interest thereon at seven per centum (7%) per annum from September 5, 1930, exclusive of all set offs and just grounds of defense.

ALBERT H. SHILLINGTON.

Subscribed and sworn to before me this 10th day of November, 1930.

[SEAL.]

J. ELIOT MORAN,
Notary Public, D. C.

5

Plea.

Filed December 11, 1930.

* * * * *

Comes now, the defendant, Lloyd R. Turner, by his attorneys, M. M. Doyle and F. A. Thuee, and for plea to the declaration filed herein, says:

He admits that he signed the promissory note described in said declaration. He admits that Peter G. Sauer died on or about the date alleged. He admits that certain credits were made on account of the principal and interest of said note as stated in the said declaration. He admits that he has refused to pay the balance claimed by the plaintiff on said note.

He denies that said promissory note was executed for a good and valuable consideration. He denies that the plaintiff is the duly appointed and qualified executor under the Will of said Peter G. Sauer. He denies that there is a balance due the plaintiff on said note of Seven Thousand, One Hundred and Twenty-Five Dollars and Seventy-Two Cents (\$7,125.72) with interest, or any other sum due the plaintiff on said note.

Your defendant says that the plaintiff was never duly appointed by the Supreme Court of the District of Columbia, and qualified executor under the Will of said Sauer, for that all the proper parties in interest were not notified as by law provided.

All the allegations in said declaration, unless expressly admitted herein, your defendant denies.

That the note of Twenty Thousand, Seven Hundred and Ninety-Six Dollars and Seventy-Seven Cents (\$20,796.77) was executed under the following circumstances:

6 The decedent, Mr. Sauer, and your defendant, for a number of years, were engaged in joint investments in real estate. These investments were principally in the form of deed of trust loans and the notes were held by Mr. Sauer and your defendant. These joint ventures were entered into because of the mutual trust each had in the other and because of the confidence Mr. Sauer had in the judgment of the defendant. Following the usual course of joint dealings of this nature, no book accounts were kept between the parties. From time to time, tentative adjustments were made between them. It was not unusual for one or the other to control certain groups of notes, the same to be worked out by the party controlling said group notes and each member of the joint venture would receive his proportionate share of the monies collected. From time to time, adjustments were made, but these adjustments did not necessarily involve the exchange of money. Often, there were debits or credits made and sometimes notes of third persons given from one to the other. These adjustments, however, were made at no fixed period of time.

In pursuance of this policy, your defendant had a certain group of notes in his possession, which were to be worked out by him. At that time, Mr. Sauer was apprehensive that one of his banks would call for additional collateral and he desired to have a note, which he could use for collateral and it was for this reason that provision was made in this note for monthly payments of One Thousand (\$1,000.00) Dollars each, otherwise, it would be of little value for bank collateral. It was accordingly agreed that the defendant should execute a note, which would be evidence of the value of Mr. Sauer's equity of the group notes, controlled by your defendant. This note was not intended to show that the amount stated on its face was actually due from the defendant to Sauer. It was agreed and understood that the defendant was to work out these group notes for the benefit of both parties and so much as might be collected thereon should be paid to each party in proper proportion and Sauer's share credited on this note. The said notes so under the con-

7

trol of the defendant never worked out in full and the amount that has been credited on account of said principal and interest has fully paid all the equity which the decedent, Sauer, had in the notes controlled by the defendant and there is now nothing due from the defendant on said note described in said declaration. Had the decedent lived, the parties to this joint venture, in the usual course of procedure, would have met and adjusted the accounts between them and cancelled the balance purporting to be due on said note.

Wherefore the defendant says that he is not indebted to the plaintiff for the sum sued on herein, or in any other sum whatsoever.

M. M. DOYLE,
F. A. THUEE,
Attorneys for Defendant.

Affidavit of Defense.

* * * * *

DISTRICT OF COLUMBIA, ss:

Lloyd R. Turner, being first duly sworn, deposes and says that he is the defendant in the above entitled cause and that he is not indebted to the plaintiff in the sum of Seven Thousand, One Hundred and Twenty-Five Dollars and Seventy-Two Cents (\$7,125.72) or in any other sum, and says that he has a complete and valid defense to the suit filed herein.

Your affiant has been actively engaged for a number of years as a real estate broker in the District of Columbia, and for some years, before the death of Mr. Sauer, he and your defendant were engaged in joint investments in real estate. These joint ventures were entered into because of the mutual trust each had in the other and because of the confidence Mr. Sauer had in the judgment of
8 the defendant. Following the usual course of joint dealings of this nature, no book accounts were kept between Mr. Sauer and your affiant. From time to time tentative adjustments were made, or attempted to be made, between Mr. Sauer and your affiant.

These joint venture investments were principally in the form of deed of trust loans and notes evidencing such loans

were held by Mr. Sauer and your affiant. Frequently, Mr. Sauer, or your affiant would have under his control a group of notes to be collected or worked out, in which group of notes, both Mr. Sauer and your affiant would have an equity.

It was not unusual for one or the other to control certain groups of these trust notes, the same to be worked out by the party controlling said group trust notes and each member of the joint venture would receive his proportionate share of the monies collected, or receive credit therefor. From time to time, adjustments were made, but these adjustments did not necessarily involve the exchange of money. Often there were debits or credits made and sometimes notes of third persons were given from one party of the joint venture to the other. These adjustments, however, were made at no fixed period of time.

In pursuance of this policy, your affiant had a certain group of notes in his possession, which were to be worked out by him, that is to say, he was to attempt to collect as much as possible on said notes. At that time, Mr. Sauer was apprehensive that one of his banks would call for additional collateral and he desired to have a note, which he could use for collateral, in the event the bank should demand the same. It was accordingly agreed that your affiant should execute a note, which would be evidence of the value of Mr. Sauer's equity in the group trust notes

9 controlled by your affiant. This note was not intended to show that the amount stated on its face was actually due from your affiant to Mr. Sauer. In order to make the note available as collateral, provision was made in the note for monthly payments of One Thousand (\$1,000.00) Dollars each, but it was never understood or agreed that your affiant should pay the One Thousand (\$1,000.00) Dollars monthly payments. It was agreed and understood that your affiant was to work out these group notes for the benefit of both parties and so much as might be collected thereon should be paid to each party in proper proportion and Sauer's share credited on this note. The said notes so under the control of your affiant never worked out in full and the amount that is credited on said notes fully represents all the equity which the decedent, Sauer, had in the notes controlled by your affiant and there is now nothing due from the affiant on said note described in said

declaration. Had the decedent lived, the parties to this joint venture, in the usual course of procedure, would have met and adjusted accounts between them and cancelled the balance purporting to be due on said note.

After the death of the decedent, when the note came into the hands of the plaintiff, your affiant knew that he did not owe any balance, but owing to the condition of the real estate market, and owing further to the fact that your affiant had never been sued in the Supreme Court, personally for a personal obligation, your affiant was very anxious to avoid being sued on the note. Your affiant felt that a suit by a bank against him might seriously affect his credit. Your affiant wrote to the plaintiff advising the plaintiff that he did not owe anything, but the plaintiff still threatened to sue. Subsequently, the plaintiff, on its own initiative, prepared a letter, addressed to it, and setting out a promise to pay certain payments on account of said note. This letter was sent by special messenger to your

affiant for your affiant's signature, and your affiant
10 hoping to avoid a lawsuit, signed the same, but affiant did not sign said statement as an admission of liability, nor does your affiant admit liability now. The payment made by your affiant in September, 1930, was made solely because he desired to avoid being made a defendant in a lawsuit, and was not an admission of liability.

Wherefore your affiant says that he is not indebted to the plaintiff in any sum whatsoever.

LLOYD R. TURNER.

Subscribed and sworn to before me this 11th day of December, A. D., 1930.

FRANK E. CUNNINGHAM,

Clerk,

By ANDREW A. HORNER,

Asst. Clerk.

M. M. DOYLE,

F. A. THUEE,

Attorneys for Defendant.

Motion to Strike Out Parts of Plea.

Filed January 17, 1931.

* * * * *

Now comes the plaintiff and moves the Court to strike out the following allegations in the plea filed by the defendant in the above entitled cause upon the grounds hereinafter set forth, namely:

1. The allegation at the bottom of page 1 of said plea, to wit:

“He denies that the plaintiff is the duly appointed and qualified executor under the will of said Peter G. Sauer,”

and the allegation at the top of page 2, to wit:

11 “Your defendant says that the plaintiff was never duly appointed by the Supreme Court of the District of Columbia, and qualified executor under the Will of said Sauer, for that all the proper parties in interest were not notified as by law provided.”

In support of said motion, plaintiff says that defendant can not, in this proceeding, attack collaterally the appointment of plaintiff as Executor on the ground that the proper parties were not notified in the probate cause.

2. The last paragraph of page 2 and first two sentences on page 3 of said plea, to wit:

“The decedent, Mr. Sauer, and your defendant, for a number of years, were engaged in joint investments in real estate. These investments were principally in the form of deed of trust loans and the notes were held by Mr. Sauer and your defendant. These joint ventures were entered into because of the mutual trust each had in the other and because of the confidence Mr. Sauer had in the judgment of the defendant. Following the usual course of joint dealings of this nature, no book accounts were kept between the parties. From time to time, tentative adjustments were made between them. It was not unusual for one or the other to control certain groups of notes, the same to be worked out by the party controlling said group notes and each member of the joint venture would receive his proportionate share

of the monies collected. From time to time, adjustments were made, but these adjustments did not necessarily involve the exchange of money. Often, there were debits or credits made and sometimes notes of third persons given from one to the other. These adjustments, however, were made at no fixed period of time.

“In pursuance of this policy, your defendant had a certain group of notes in his possession, which were to be worked out by him. At that time, Mr. Sauer was apprehensive that one of his banks would call for additional collateral and he desired to have a note, which he could use for collateral, and it was for this reason that provision was made in this note for monthly payments of One Thousand (\$1,000.00) Dollars each, otherwise, it would be of little value for bank collateral.”

In support of said motion, plaintiff says that said allegations are argumentative, irrelevant, immaterial and
12 evidence to prove the facts so alleged would be inadmissible at the trial of this cause. Dealings and transactions between defendant and the decedent, Peter G. Sauer, alleged to have occurred prior to the execution of the note upon which this action was filed, are not pertinent to the issue sought to be raised by defendant as to the validity of said note. Decedent's alleged desire to obtain a note for the purpose of using it as collateral at a bank is also immaterial.

3. The sentence at the bottom of page 3 of said plea, to wit:

“Had the decedent lived, the parties to this joint venture, in the usual course of procedure, would have met and adjusted the accounts between them and cancelled the balance purporting to be due on said note.”

In support of said motion, defendant says that the above allegation as to what the parties would have done if decedent had lived, is wholly irrelevant and immaterial.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,

Attorneys for Plaintiff.

Messrs. M. M. Doyle and F. A. Thuee,
Attorneys for Defendant:

Please take notice that the foregoing motion will be for hearing on Friday, January 23rd, 1931.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Plaintiff.

13 *Motion for Bill of Particulars.*

Filed January 17, 1931.

* * * * *

Now comes the plaintiff and moves the Court to require the defendant to furnish a bill of particulars showing what "group of notes" was controlled by defendant, as alleged in said plea, who were the makers of said notes, what were the dates and amounts thereof, and what payments were collected thereon and credited on the note for \$20,796.77, upon which this action was brought.

In support of said motion, plaintiff says that defendant alleges in his plea that said note for \$20,796.77, payable to the order of Peter G. Sauer, now deceased, was executed by the defendant as "evidence of the value" of said decedent's equity in a group of notes controlled by defendant; that said group of notes "never worked out in full" and the amount credited on account of principal and interest on said note for \$20,796.77 "fully paid all the equity" which said decedent had in said group of notes, but said plea does not contain any information as to the dates, amounts, makers, maturities or payments collected upon said alleged "group of notes" and plaintiff respectfully submits that it is entitled to some definite information in regard to said notes so that it may be able to reply to said plea and prepare for the trial of this cause. Said plea further admits but fails to explain the payment of \$3000 made by defendant on account of said note for \$20,796.77, to plaintiff, as Executor, on September 5, 1930, more than a year after said Sauer's death.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Plaintiff.

14 To Messrs. M. M. Doyle and F. A. Thuee,
Attorneys for Defendant:

Please take notice that the foregoing motion will be for hearing on Friday, January 23rd, 1931.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Plaintiff.

Amended Plea.

Filed March 3, 1931.

* * * * *

Leave of Court being first had and obtained, comes now, the defendant, Lloyd R. Turner, by his attorneys, M. M. Doyle and F. A. Thuee, and for amended plea to the declaration filed herein, says:

He admits that he signed the promissory note described in said declaration. He admits that Peter G. Sauer died on or about the date alleged. He admits that certain credits were made on account of the principal and interest of said note as stated in the said declaration. He admits that he has refused to pay the balance claimed by the plaintiff on said note.

He denies that said promissory note was executed for a good and valuable consideration. He denies that there is a balance due the plaintiff on said note of Seven Thousand, One Hundred and Twenty-Five Dollars and Seventy-Two Cents (\$7,125.72) with interest, or any other sum due the plaintiff on said note.

All the allegations in said declaration, unless expressly admitted herein, your defendant denies.

That the note of Twenty Thousand, Seven Hundred and Ninety-Six Dollars and Seventy-Seven Cents (\$20,-
15 796.77) was executed under the following circumstances:

The decedent, Mr. Sauer, and your defendant, for a number of years, were engaged in joint investments in real estate. These investments were principally in the form of deed of trust loans and the notes were held by Mr. Sauer and your defendant. These joint ventures were entered into because of the mutual trust each had in the other and because of the confidence Mr. Sauer had in the judgment of

the defendant. Following the usual course of joint dealings of this nature, no book accounts were kept between the parties. From time to time, tentative adjustments were made between them. It was not unusual for one or the other to control certain groups of notes, the same to be worked out by the party controlling said group notes and each member of the joint venture would receive his proportionate share of the monies collected. From time to time adjustments were made, but these adjustments did not necessarily involve the exchange of money. Often, there were debits or credits made and sometimes notes of third persons given from one to the other. These adjustments, however, were made at no fixed period of time.

In pursuance of this policy, your defendant had a certain group of notes in his possession, which were to be worked out by him. At that time, Mr. Sauer was apprehensive that one of his banks would call for additional collateral and he desired to have a note, which he could use for collateral and it was for this reason that provision was made in this note for monthly payments of One Thousand (\$1,000.00) Dollars each, otherwise, it would be of little value for bank collateral. It was accordingly agreed that the defendant should execute a note, which would be evidence of the value of Mr. Sauer's equity of the group notes, controlled by your defendant. This note was not intended to show that the amount stated on its face was actually

16 due from the defendant to Sauer. It was agreed and understood that the defendant was to work out these group notes for the benefit of both parties and so much as might be collected thereon should be paid to each party in proper proportion and Sauer's share credited on this note. The said notes so under the control of the defendant never worked out in full and the amount that has been credited on account of said principal and interest has fully paid all the equity which the decedent, Sauer, had in the notes controlled by the defendant and there is now nothing due from the defendant on said note described in said declaration.

Wherefore the defendant says that he is not indebted to the plaintiff for the sum sued on herein, or in any other sum whatsoever.

M. M. DOYLE,
F. A. THUEE,
Attorneys for Defendant.

Bill of Particulars.

* * * * *

The following note purchases and losses were joint ventures of Lloyd R. Turner, defendant, and Peter G. Sauer, and as referred to in the plea filed herein, no book accounts were kept between the parties:

Note of Emma J. Chew, dated August 16, 1926, for \$500.00, secured by second deed of trust on Lot 23, Square 590, this city, payable to a third party and transferred to Turner and Sauer.

This property was sold under foreclosure of a first deed of trust, the second deed of trust and note, above described being a total loss to Turner and Sauer.

Note of George D. Bargus, dated December 15, 1925, for \$490.38, secured on Lot C, Square 650, this city, Turner and Sauer purchased this note and later sold same at approximate loss of fifty (50%) percent.

17 Note of George H. Franklin, dated August 26, 1926, for \$2,500.00, secured by second deed of trust on real estate, situated on Dewey Street, Hyattsville, Md., property sold causing loss of \$1500.00 to Sauer and Turner.

Note of Harry E. Shapiro, dated May 26, 1927, for \$2400.00, secured by second deed of trust on Lot 19, Square 279, this city; holders of first deed of trust foreclosed, and this note being then held by Sauer and Turner became total loss.

Note of A. J. Simon, for \$2820.00, secured on Lot 11, Square 623, this city. Sauer and Turner held note for money loaned on this property. Subsequently Sauer and Turner traded note for bonds in Consolidated Granite Corporation, and these bonds were later sold by Sauer and Turner for twenty (20¢) to thirty (30¢) cents loss on their traded value.

M. M. DOYLE,

F. A. THUEE,

Attorneys for Defendant.

Motion for Better Bill of Particulars.

Filed March 10, 1931.

* * * * *

Now comes the plaintiff and moves the Court to require the defendant to furnish a better bill of particulars.

In support of said motion, plaintiff says that in its motion for a bill of particulars, which was granted by this Court on the 27th day of February, 1931, plaintiff moved that the defendant be required "to furnish a bill of particulars showing what 'group of notes' was controlled by defendant, as alleged in said plea, who were the makers of said notes, what were the dates and amounts thereof, and what payments were collected thereon and credited on the note for \$20,796.77, upon which this action was brought", whereas defendant in the bill of particulars which he has filed, refers only to five notes, totalling \$8,710.38, which he states were joint ventures of Peter G. Sauer and the defendant, and in which he states certain approximate losses were sustained. He has not listed the notes totalling \$20,796.77, showing the names of the makers, the
18 dates and the amounts thereof. Nor has he listed the amounts collected on account of said notes and credited on the note for \$20,796.77. If defendant has a *bona fide* defense to this action, in whole or in part, he should be required to set it forth fully and fairly, in order that the plaintiff may properly meet that defense.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Plaintiff.

To Messrs. M. M. Doyle and F. A. Thuee,
Attorneys for Defendant:

Please take notice that the foregoing motion will be for hearing on Friday, March 13th, 1931.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Plaintiff.

Second Amended Plea.

Filed April 16, 1931.

* * * * *

Leave of Court being first had and obtained, comes now the defendant, Lloyd R. Turner, by his attorneys, M. M. Doyle and F. A. Thuee, and for his second amended plea to the declaration filed herein, says:

He admits he signed the promissory note described in said declaration. He admits that Peter G. Sauer died on or about the date alleged. He admits that certain credits were made on account of the principal and interest on said note as stated in said declaration, but denies that the last credit made by the plaintiff on September 5, 1930, on account of the principal and interest on said note was correctly made. He admits that he has refused to pay
19 the balance claimed by the plaintiff on said note.

He denies that said promissory note was executed for a good and valuable consideration. He denies that there is a balance due the plaintiff on said note of Seven Thousand, One Hundred and Twenty-Five Dollars and Seventy-Two Cents (\$7,125.72) with interest, or any other sum due the plaintiff on said note.

All the allegations in said declaration, unless expressly admitted herein, your defendant denies.

That the note of Twenty Thousand, Seven Hundred and Ninety-Six Dollars and Seventy-Seven Cents (\$20,796.77) was executed under the following circumstances:

The decedent, Mr. Sauer, and your defendant, for a number of years, were engaged in joint investments in real estate. These investments were principally in the form of deed of trust loans and the notes were held by Mr. Sauer and your defendant. These joint ventures were entered into because of the mutual trust each had in the other and because of the confidence Mr. Sauer had in the judgment of the defendant. Following the usual course of joint dealings of this nature, no book accounts were kept between the parties. From time to time, tentative adjustments were made between them. It was not unusual for one or the other to control certain groups of notes, the same to be worked out by the party controlling said group notes and each member of the joint venture would receive his proportionate share of the monies collected. Often there were debits and credits made. These debits or credits sometimes consisted of interest or principal paid on account of groups of notes and sometimes notes of third persons were given from one to the other. These adjustments, however, were made at no fixed period of time.

In pursuance of this policy, your defendant had a certain group of notes in his possession, which were to be
20 worked out by him. At that time, Mr. Sauer was apprehensive that one of his banks would call for ad-

ditional collateral and he desired to have a note, which he could use for collateral and it was for this reason that provision was made in this note for monthly payments of One Thousand (\$1,000.00) Dollars each, otherwise, it would be of little value for bank collateral. It was accordingly agreed that the defendant should execute a note, which would be evidence of the value of Mr. Sauer's equity in the group notes, controlled by your defendant. This note was not intended to show that the amount stated on its face was actually due from the defendant to Sauer. It was agreed and understood that the defendant was to work out these group notes for the benefit of both parties and so much as might be collected thereon should be paid to each party in proper proportion and Sauer's share credited on this note. The said notes so under the control of the defendant never worked out in full and the amount that has been credited on account of said principal and interest has fully paid all the equity which the decedent, Sauer, had in the notes controlled by the defendant and there is now nothing due from the defendant on said note described in said declaration.

The credits on said note purporting to be for the payments on account of principal and interest due, except the entry of September 5, 1930, represent not the actual interest earned, by the face of the note itself, but represent the portion of the principal and interest collected by Turner on the group of said notes, which belonged to Sauer.

The promissory note sued on herein was kept in a drawer in the defendant's safe. Upon the decedent's death, the defendant notified the plaintiff of the note and when this was turned over to the plaintiff, the defendant explained that the note involved mutual dealings between the defendant and decedent.

21 No question was raised by the plaintiff at that time, but subsequently the plaintiff threatened to sue your defendant and the defendant being a real estate broker, owing to the condition of the real estate market, was anxious to avoid being sued by a Bank on what on its face appeared to be a personal obligation. Your defendant thereupon in September, 1930, made a payment of Three Thousand (\$3,000.00) Dollars and the plaintiff without any right and in violation of the method of dealings between the decedent and your defendant and without notifying the

defendant of its purpose so to do, wrongfully applied approximately Thirteen Hundred (\$1300.00) Dollars of the above Three Thousand (\$3,000.00) Dollars payment to what plaintiff termed to be back interest, whereas the plaintiff should rightfully have credited the whole Three Thousand (\$3,000.00) Dollars on account of the principal of the note.

Wherefore the defendant says that it is not indebted to the plaintiff for the sum sued on herein or in any other sum whatsoever.

M. M. DOYLE,
F. A. THUEE,
Attorneys for Defendant.

Amended Affidavit of Defense.

* * * * *

DISTRICT OF COLUMBIA, ss:

Lloyd R. Turner, being first duly sworn, deposes and says that he is the defendant in the above entitled cause and that he is not indebted to the plaintiff in the sum of Seven Thousand, One Hundred and Twenty-Five Dollars and Seventy-Two Cents (\$7,125.72) or in any other sum, and says that he has a complete and valid defense to the suit filed herein.

22 Your affiant has been actively engaged for a number of years as a real estate broker in the District of Columbia, and for some years, before the death of Mr. Sauer, he and your defendant were engaged in joint investments in real estate. These joint ventures were entered into because of the mutual trust each had in the other and because of the confidence Mr. Sauer had in the judgment of the defendant. Following the usual course of joint dealings of this nature, no book accounts were kept between Mr. Sauer and your affiant. From time to time tentative adjustments were made, or attempted to be made, between Mr. Sauer and your affiant.

These joint venture investments were principally in the form of deed of trust loans and notes evidencing such loans were held by Mr. Sauer and your affiant. Frequently, Mr. Sauer, or your affiant would have under his control a group of notes to be collected or worked out, in

which group of notes both Mr. Sauer and your affiant would have an equity.

It was not unusual for one or the other to control certain groups of these trust notes, the same to be worked out by the party controlling said group trust notes and each member of the joint venture would receive his proportionate share of the monies collected, or receive credit therefor. From time to time, adjustments were made, but these adjustments did not necessarily involve the exchange of money. Often there were debits and credits made. These debits or credits sometimes consisted of interest or principal paid on account of groups of notes and sometimes notes of third persons were given from one to the other. These adjustments, however, were made at no fixed period of time.

In pursuance of this policy, your affiant had a certain group of notes in his possession, which were to be worked out by him, that is to say, he was to attempt to collect as much as possible on said notes. At that time,

23 Mr. Sauer was apprehensive that one of his banks would call for additional collateral, and he desired to have a note, which he could use for collateral, in the event the bank should demand the same. It was accordingly agreed that your affiant should execute a note, which would be evidence of the value of Mr. Sauer's equity in the group trust notes controlled by your affiant. This note was not intended to show that the amount stated on its face was actually due from your affiant to Mr. Sauer. In order to make the note available as collateral, provision was made in the note for monthly payments of One Thousand (\$1,000.00) Dollars each, but it was never understood or agreed that your affiant should pay the One Thousand (\$1,000.00) Dollars monthly payments. It was agreed and understood that your affiant was to work out these group notes for the benefit of both parties and so much as might be collected thereon should be paid to each party in proper proportion and Sauer's share credited on this note. The said notes so under the control of your affiant never worked out in full and the amount that it credited on said notes fully represents all the equity which the decedent, Sauer, had in the notes controlled by your affiant and there is now nothing due from the affiant on said note described in said declaration. Had the decedent lived, the parties

to this joint venture, in the usual course of procedure, would have met and adjusted accounts between them and cancelled the balance purporting to be due on said note.

The note sued on herein was kept in a drawer in the defendant's safe and after the appointment of the plaintiff, as executor, your defendant notified it that the note was in the defendant's safe. When said note was turned over, your defendant notified the plaintiff that the note involved mutual dealings between the decedent and defendant.

24 Subsequently the plaintiff began to press for payment of said note. Your affiant knew that he did not owe any balance, but owing to the condition of the real estate market, and owing further to the fact that your affiant had never been sued in the Supreme Court personally for a personal obligation, your affiant was very anxious to avoid being sued on the note. Your affiant felt that a suit by a bank against him might seriously affect his credit. Your affiant wrote to the plaintiff advising the plaintiff that he did not owe anything, but the plaintiff still threatened to sue. Subsequently, the plaintiff, on its own initiative, prepared a letter, addressed to it, and setting out a promise to pay certain payments on account of said note. This letter was sent by special messenger to your affiant for your affiant's signature, and your affiant hoping to avoid a lawsuit, signed the same, but affiant did not sign said statement as an admission of liability, nor does your affiant admit liability now. The payment of Three Thousand (\$3,000.00) Dollars made by your affiant in September, 1930, was made solely because he desired to avoid being made a defendant in a lawsuit, and was not an admission of liability.

The plaintiff without any right and in violation of the method of dealings between the decedent and your defendant and without notifying the defendant of its purpose so to do, wrongfully applied approximately Thirteen Hundred (\$1,300.00) Dollars of the above Three Thousand (\$3,000.00) Dollars payment to what plaintiff termed to be back interest, whereas the plaintiff should rightfully have credited the whole Three Thousand (\$3,000.00) Dollars on account of the principal of the note.

Wherefore your affiant says that he is not indebted to the plaintiff in any sum whatsoever.

LLOYD R. TURNER.

25 Subscribed and sworn to before me this 16th day
 of April, A. D., 1931.

[SEAL.]

KATHRYN L. FOLTZ,
 Notary Public, D. C.

M. M. DOYLE,
F. A. THUEE,
 Attorneys for Defendant.

Motion for Judgment.

Filed April 22, 1931.

* * * * * * *

Now comes the plaintiff, American Security and Trust Company, a corporation, Executor under the will of Peter G. Sauer, deceased, and moves the Court to enter judgment against the defendant, Lloyd R. Turner, for the amount claimed in the declaration filed by the plaintiff in the above entitled cause, because of defendant's failure to comply with the order entered herein by the Court on February 13, 1931.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
 Attorneys for Plaintiff.

To Messrs. M. M. Doyle and F. A. Thuee,
Attorneys for Defendant:

Please take notice that the points to be submitted in support of this motion, and the authorities intended to be used, are attached hereto. The rules of the above entitled court require, that if you oppose the granting of the above motion, you, or your counsel, shall within five days from the date of service of a copy of this motion upon you, or such further time as the said court may grant, or, as the parties to this suit may agree upon, file in reply with the clerk of said court, a statement of the points and authorities upon which
26 you rely, and serve a copy thereof upon counsel for the plaintiff.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
 Attorneys for Plaintiff.

Service & copy acknowledged April 22, 1931.

M. M. DOYLE,
F. A. THUEE,
Atty's D'f't.

Memorandum in Support of Motion for Judgment.

* * * * *

In support of the motion for judgment hereto attached, plaintiff respectfully states:

1. On November 13, 1930, plaintiff filed its declaration, with bill of particulars and affidavit of merit attached, claiming from the defendant the sum of \$7,125.72, with interest, representing the balance overdue on a note of \$20,796.77, dated February 4, 1928, signed by the defendant and payable in monthly instalments to Peter G. Sauer, now deceased.

2. On December 11, 1930, defendant filed a plea, with affidavit attached, stating in effect that said note for \$20,796.77 represented Sauer's equity in a "group of notes," which were to be "worked out" by the defendant, in connection with a joint enterprise of Sauer and the defendant in dealing in real estate notes, and that the amount credited on said note represented full payment to Sauer of his said equity, as the notes worked out.

3. On January 17, 1931, plaintiff filed a motion for a bill of particulars showing what "group of notes" was controlled by defendant, as alleged in said plea, who were the makers of said notes, what were the dates and amounts thereof, and what payments were collected thereon
27 and credited on the note for \$20,796.77, upon which this action was brought. This motion was argued before Mr. Justice Stafford on February 13, 1931, and was granted.

4. On March 3, 1931, defendant filed an amended plea and bill of particulars, and in said bill listed five notes totalling \$8,710.38, which, he stated were joint ventures of Sauer and the defendant, and in which certain losses, approximating \$5,491.00, were sustained.

5. On March 10, 1931, plaintiff filed a motion for a better bill of particulars to comply with the Court's order granting the original motion for a bill of particulars. This motion was argued on March 20, 1931, before Mr. Justice Stafford, who ordered the defendant to file a bill of partic-

ulars promptly in accordance with the Court's previous order of February 13, 1931.

6. On April 16, 1931, defendant filed a second amended plea, with affidavit attached, in which he made substantially the same defense as that set forth in his original and in his first amended plea, referring again to the "group of notes" and Sauer's equity therein.

7. Said second amended plea and affidavit of defense were not accompanied by any bill of particulars and defendant has never, at any time, complied with said original order of February 13, 1931, which required him to furnish a bill of particulars showing what "group of notes" was controlled by defendant, as alleged in said plea, who were the makers of said notes, what were the dates and amounts thereof, and what payments were collected thereon and credited on the note for \$20,796.77, upon which this action was brought.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Plaintiff.

Service acknowledged April 22, 1931.

M. M. DOYLE.
F. A. THUEE.

28 *Motion in Opposition of Motion for Judgment and
Request for Oral Hearing.*

Filed April 28, 1931.

* * * * *

Comes now, the defendant, by his attorneys, M. M. Doyle and F. A. Thuee, and says that the Motion for Judgment filed herein by the plaintiff, to wit, on the 22nd day of April, A. D., 1931, should not be granted.

In Opposition to the Motion, your defendant respectfully represents to this Honorable Court as follows:

That after the ruling by Judge Stafford on February 13, 1931, and upon leave of Court being first had and obtained, your defendant filed a second amended Plea and an amended Affidavit, which your defendant prays the Court to read upon considering this Motion. Your defendant filed no further Bill of Particulars for the reason that:

First, in the opinion of the defendant, this Court had no authority or right, as a matter of law, to compel the defendant to file a Bill of Particulars.

The plaintiff cannot be compelled to state matters of evidence in his Bill of Particulars—*Craig v. Parish*, 43 App. D. C. 452. A fortiori, even if the Court had authority to compel the defendant to file a Bill of Particulars, it could not compel the defendant to state matters of evidence in a Bill of Particulars.

Secondly, the defendant had filed the fullest Bill of Particulars, of which he was capable, at this time. The transactions between the defendant and the decedent were numerous and the notes were changing from time to time and the transactions were very much involved, deals being carried on quite extensively on behalf of both parties. The credits which show upon the face of the note sued upon represent notes that were worked out or substituted
29 and the group notes were reduced to approximately, Eight Thousand, Eight Hundred (\$8,800.00) Dollars.

Certainly the defendant herein should have the right to present his story to the jury to show how the group notes were worked out and credits made on the face of the note sued here and the reasons for which the note was given and this Court should not, by summary judgment, deprive the defendant of his right to a jury trial.

It is for this reason that a fuller Bill of Particulars could not be given at this time and it is for this reason that it is imperative that the defendant be given an opportunity to present his defense to a jury and not to have his rights summarily cut off without a jury trial, which would be the effect if this Motion were granted.

The Court's attention is further directed to the fact that the second amended Plea and the amended Affidavit show that it was customary, in the course of dealings between the decedent and defendant to only charge and credit, as principal and interest paid on account of the note, the amount collected on transactions which were for the mutual benefit of the parties involved. That after the death of the decedent, when the Three Thousand (\$3,000.00) Dollars was paid by the defendant, under the circumstances narrated in said second amended Plea and amended Affidavit, that without right and in violation of the practice heretofore existing

between the decedent and your defendant, the plaintiff herein computed the interest on the basis of the original date of the note and then wrongfully applied approximately Thirteen Hundred (\$1300.00) Dollars of the Three Thousand (\$3,000.00) Dollars, payment, to the credit of interest. Certainly, a question as to whether the Thirteen Hundred (\$1300.00) Dollars should be credited on account of principal, rather than on account of interest is a
 30 matter which is properly the province of the jury and of which this Court has no right to decide by method of summary judgment.

Request for Oral Hearing.

Inasmuch as the matters sued on herein are very much involved and the amount claimed by the plaintiff, as executor of the decedent, is a large sum, and a summary judgment is sought for the amount sued on, it is respectfully requested that an oral argument be allowed on behalf of the plaintiff and defendant on this Motion.

M. M. DOYLE,
 F. A. THUEE,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

Thursday, May 7, 1931.

Sessions resumed pursuant to adjournments.

Hon. Jennings Bailey, Joseph W. Cox, Justices, presiding.

* * * * *

Upon consideration of the motion filed herein for judgment against the defendant for failure to comply with the order of the Court on February 13, 1931 it is ordered that said motion be and the same is hereby granted.

Wherefore, it is considered that plaintiff recover of defendant the sum of Seven Thousand One Hundred Twenty-five Dollars and Seventy-two Cents (\$7125.72) with interest thereon at the rate of seven per cent (7%) per annum until paid from the 5th day of September, 1930, together with costs of suit to be taxed by the clerk and have execution thereof.

To the foregoing judgment the defendant by his attorney of record in open court, notes an appeal to the Court of Appeals of this District. Whereupon, an undertaking
31 to act as a supersedeas is hereby fixed in the sum of Nine Thousand Five Hundred Dollars (\$9500.00).

BAILEY,
Justice.

Memoranda.

June 1, 1931.—Cost Bond fixed at \$100 or \$50 deposit. \$50 deposited by Thuee in lieu of bond on appeal.

Assignment of Errors.

Filed August 7, 1931.

* * * * *

The Court erred:

- (1) In granting plaintiff's motion for judgment.
- (2) In not sustaining defendant's motion in opposition to plaintiff's motion for judgment.
- (3) In granting plaintiff's motion for judgment for failure of the defendant to file a further Bill of Particulars.
- (4) In ordering plaintiff to file a further Bill of Particulars.
- (5) In depriving defendant of his right of trial before a jury.
- (6) In other respect- apparent of record.

M. M. DOYLE,
F. A. THUEE,
Attorneys for Defendant.

32

Designation of Record.

Filed June 12, 1931.

* * * * *

Now comes Lloyd R. Turner, defendant herein, now appellant, in the above entitled cause and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, namely:

1. Declaration and Bill of Particulars, filed November 13, 1930.
2. Defendant's plea and affidavit of defense, filed December 11, 1930.
3. Plaintiff's Motion to strike parts of plea and Motion for Bill of Particulars, filed Jan. 17, 1931.
4. Defendant's Amended Plea and Bill of Particulars, filed March 3, 1931.
5. Plaintiff's Motion for better Bill of Particulars, filed March 10, 1931.
6. Defendant's second Amended Plea and Affidavit of Defense, filed April 16, 1931.
7. Plaintiff's Motion for Judgment, filed April 22, 1931.
8. Defendant's Motion in opposition of Plaintiff's Motion for Judgment and request for oral hearing, filed April 28, 1931.
9. Memorandum showing noting of appeal, date and amount; also date and amount cash filed in lieu of cost bond.
10. This designation of record.

M. M. DOYLE,

F. A. THUEE,

Attorneys for Defendant.

Service acknowledged this 11th day of June, A. D. 1931.

McKENNEY, FLANNERY & CRAIGHILL,

By G. BOWDOIN CRAIGHILL,

A.,

Attorneys for Plaintiff.

M. M. DOYLE,

F. A. THUEE,

Attorneys for Defendant.

Filed June 17, 1931.

* * * * *

Now comes the American Security and Trust Company, a corporation, Executor under the will of Peter G. Sauer, deceased, appellee in the above entitled cause, and designates parts of the record to be included in the transcript in addition to those designated by appellant, such addi-

tional parts being deemed necessary and material for the determination of the questions raised on appeal, namely:

1. Affidavit of merit, filed November 13, 1930;
2. Memorandum in support of plaintiff's motion for judgment, filed April 22, 1931;
3. This designation.

McKENNEY, FLANNERY & CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Appellee.

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 33, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copies of which are made part of this transcript, in cause No. 78832 at Law, wherein American Security and Trust Company, a corporation, Executor under the will of Peter G. Sauer, deceased, is Plaintiff and Lloyd R. Turner is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 10th day of August, 1931.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By R. S. WAYLAND,
Asst. Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 5468. Lloyd R. Turner, appellant, vs. American Security and Trust Company, a corporation, executor under the will of Peter G. Sauer, deceased. Court of Appeals, District of Columbia. Filed Aug. 10, 1931. Henry W. Hodges, Clerk.